Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Petition for Declaratory Ruling Filed by CTIA Regarding Whether Early Termination Fees Are "Rates Charged" Within 47 U.S.C. Section 332	)	WT Docket No. 05-194
	)	
Petition for Declaratory Ruling Filed by SunCom, and Opposition and Cross-Petition For Declaratory Ruling Filed by Debora Edwards, Seeking Determination of Whether State Law Claims Regarding Early Termination Fees Are Subject to Preemption Under 47 U.S.C. Section 332(c)(3)(A)	)	WT Docket No. 05-193

To: The Commission

REPLY COMMENTS

J.R. CARBONELL
CAROL L. TACKER
DAVID G. RICHARDS
CINGULAR WIRELESS LLC
5565 Glenridge Connector, Suite 1700
Atlanta, GA 30342
(404) 236-5543

Its Attorneys

August 25, 2005

SUMMARY

The comments filed in support of the CTIA petition demonstrate that "early termination fees" ("ETFs") are "rates charged" for CMRS and that, therefore, applications of state law that have the effect of regulating ETFs are preempted by Section 332(c)(3)(A) of the Act. In contrast, the comments filed in opposition to the CTIA petition neither show that ETFs are anything other than "rates charged" for CMRS, nor do they articulate any legal or policy justification for exposing ETFs to regulation, modification, or abolition pursuant to parochial judgments of "fairness" by state legislatures or lay juries.

The opponents to preemption argue that ETFs cannot be rates because they are not based on the actual costs of serving a subscriber who prematurely terminates a service contract. However, the Commission, which has had exclusive jurisdiction over CMRS rates since 1993, has never applied cost-based rate regulation to CMRS carriers. Moreover, the "cost based" test for preemption advocated by the opponents is utterly irreconcilable with the experimentation and innovation in pricing plans, levels, and structures that the competitive marketplace forces, and the Commission wants, carriers to undertake. The opponents' remaining quasi-factual arguments – that ETFs cannot be "rates" because they do not comport with a dictionary definition or because they are characterized as liquidated damages in CMRS service contracts – are nothing more than semantic distinctions that are irrelevant to whether ETFs are, in fact, rates.

The opponents insist that the Commission's own decisions require denial of the CTIA petition, some asserting that the petition seeks preemption of "any and all" applications of state consumer protection, tort and contract laws that might touch upon ETFs. This is of course a gross exaggeration: It is only those applications of state law that address the "fairness, reasonableness, or cost-basis" of an ETF – the hallmark of rate regulation – that are the subject of the CTIA petition. As exhaustively shown in the comments filed in support, the Commission's prior rulings overwhelmingly support this narrowly tailored preemption request. Significantly, in all their discussion of Commission precedent, none of the opponents addresses the most pertinent decision – the Commission's recent order confirming that Section 332(c)(3)(A) preempts state regulation of CMRS line item charges. The analysis used by the Commission to demonstrate that line item charges constitute "rates charged" for CMRS for purposes of preemption applies with equal force to ETFs.

The opponents rely heavily on a number of conflicting court decisions that appear to find that ETFs are not "rates charged" for purposes of Section 332. This reliance is misplaced, first, because none of the cited decisions is in any way binding on the Commission, and, second, because their persuasive value is marginal at best given their procedural posture or lack of analysis. The opponents' invocation of the Communications Act's "savings clause" is even less persuasive.

Finally, the opponents of preemption argue that ETFs should be regulated by the states because the federal regulatory scheme does not protect consumers. This is clearly incorrect. The market-based regulation of CMRS rates through competition has produced a level of consumer

choice unparalleled in any other regulated telecommunications field. In the unlikely event that the competitive market should fail to provide alternatives to unreasonable ETFs, consumers have recourse to the Commission for adjudication of their complaints.

The federal policy of regulating CMRS rates through competitive market forces, backed by Commission oversight, has yielded tremendous results, in terms of both industry development and consumer benefits. Back-door regulation of CMRS providers' ETFs through state-law class action lawsuits is fundamentally inconsistent with that policy. Although such applications of state law are prohibited by Section 332(c)(3)(A), a number of courts have failed to enforce that prohibition. Therefore, the Commission must do so by granting the CTIA petition.

TABLE OF CONTENTS

Page

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Petition for Declaratory Ruling Filed by CTIA Regarding Whether Early Termination Fees Are "Rates Charged" Within 47 U.S.C. Section 332	)	WT Docket No. 05-194
	)	
Petition for Declaratory Ruling Filed by SunCom, and Opposition and Cross-Petition For Declaratory Ruling Filed by Debora Edwards, Seeking Determination of Whether State Law Claims Regarding Early Termination Fees Are Subject to Preemption Under 47 U.S.C. Section 332(c)(3)(A)	)	WT Docket No. 05-193

To: The Commission

REPLY COMMENTS

Cingular Wireless LLC ("Cingular"), by its attorneys, files these reply comments in the above-captioned dockets. For the reasons set forth herein, as well as those set forth in Cingular's initial comments, the Federal Communications Commission ("Commission" or "FCC") should grant the Petition of the Cellular Telecommunications & Internet Association for an Expedited Declaratory Ruling ("CTIA petition") by issuing a ruling (a) declaring that the Early Termination Fees ("ETFs") assessed by Commercial Mobile Radio Service ("CMRS") carriers in the context of a customer prematurely terminating a term contract constitute "rates charged" under Section 332(c)(3)(A) of the Communications Act, as amended (the "Act"), and (b) confirming that Section 332(c)(3)(A) preempts any application of state law by a court or tribunal to invalidate, modify or condition the use of enforcement of ETFs based, in whole or in part, upon an assessment of the reasonableness, fairness, or cost basis of an ETF, or to prohibit the use or enforcement of ETFs as unlawful penalties or liquidated damages.

I. INTRODUCTION

The comments filed by Cingular, Dobson Communications, Nextel, Sprint, Suncom, T-Mobile, US Cellular, and Verizon Wireless (the "Carriers") demonstrate that ETFs are "rates charged" by CMRS carriers and that, therefore, applications of state law challenging ETFs on the basis of "fairness" or "reasonableness" constitute state regulation of CMRS rates in violation of Section 332(c)(3)(A). The Carriers' comments also demonstrate that, even if ETFs were not "rates charged" for CMRS and not within the preemptive scope of Section 332(c)(3)(A), the Commission should nevertheless declare such applications of state law preempted. Piecemeal regulation of ETFs by individual states is inconsistent with the federal policy of a market-based, uniform, national and deregulatory framework for CMRS, and to permit state regulation of ETFs by lawsuit would undermine the benefits derived from allowing carriers flexibility to design and implement ETF-based rate structures on a nationwide or regional basis. In contrast, those commenters opposing the CTIA petition – AARP, Consumers Union, NASUCA, UCAN, WCA, and the plaintiff in the Suncom case – fail to show why ETFs are properly subject to regulation, modification, or abolition by state commissions, courts, and class-action lawyers pursuant to parochial judgments of "fairness" by state legislatures or lay juries.

The Commission has made clear that the statutory proscription of state rate regulation extends to regulation of CMRS "rate levels" and "rate structures."[1] As shown by the CTIA

---

[1] *In the Matter of Truth-in-Billing and Billing Format; National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-in-Billing*, CC Docket No. 98-170; CG Docket No. 04-208, Second Report and Order, Declaratory Ruling, and

petition and the Carriers' comments, ETFs are "rates" because they are an alternative charge for the provision of CMRS—that is, part of the price paid by subscribers for service provided under a term contract if they do not maintain their subscription for the full term—and they are also elements of CMRS carriers' term contract "rate structure," in which lower upfront charges (including handset charges) and monthly fees are offered in exchange for a term commitment backed by an ETF.[2]

The opponents to preemption seize on various immaterial characteristics of ETFs to assert that they are not "rates charged" by CMRS carriers but instead constitute "other terms and conditions" subject to state regulation. They argue that ETFs cannot be rates because they are not based on the costs of serving a subscriber who prematurely terminates a service contract. However, the Commission has never applied such specific, cost-based rate regulation to CMRS carriers, and it expressly declined to do so when it undertook to regulate CMRS rates through market forces in the first instance. Moreover, whether ETFs are "cost based" is irrelevant to the purely legal question of whether an ETF is a "rate charged" by a CMRS carrier. WCA and others also argue, unconvincingly, that ETFs cannot be "rates" because they do not comport with artificially narrow definitions of "rate" and because they are characterized as liquidated damages in CMRS service contracts. Such semantic distinctions are irrelevant to whether ETFs are, in fact, rates.

Turning to legal arguments, the opponents insist that the Commission's own decisions require denial of the CTIA petition, some asserting that the petition seeks preemption of any and

---

Second Further Notice of Proposed Rulemaking, 20 F.C.C.R. 6448, 6462-63, ¶ 30 (2005) [hereinafter *Second Truth-in-Billing Order*].

[2] CTIA Petition at 1-2, 11-19; Cingular Comments at 3-4, 10-16; Dobson Comments at 2-4; Nextel Comments at 4-9, 18-20; Sprint Comments at 8-10; Suncom Comments at 6-13; T-Mobile Comments at 4-7, 12-15; Verizon Wireless Comments at 5-6, 9-17, 22-24.

all applications of state consumer protection, tort and contract laws that might touch upon ETFs. This argument is cut from whole cloth. The CTIA petition seeks only a ruling that: (1) ETFs are "rates charged" for wireless services within the meaning of Section 332(c)(3)(A) and FCC precedent; and (2) any application of state law that purports to authorize a court or other tribunal to invalidate, modify, or condition the use or enforcement of ETFs based, in whole or in part, upon an assessment of the reasonableness, fairness or cost-basis of the ETF, or upon an application of state law prohibiting the use or enforcement of ETFs or so-called "liquidated damages" provisions, constitutes unlawful rate regulation and is therefore preempted by Section 332(c)(3)(A).[3] Thus, state laws governing deceptive trade practices, misrepresentation, and breach of contract remain unaffected when applied to determine whether an ETF was properly disclosed or made part of a subscriber's contract. It is only those applications of state law that address the "fairness, reasonableness, or cost-basis" of an ETF – the hallmark of rate regulation – that are the subject of the CTIA petition. The fact that the some opponents must mischaracterize the CTIA petition in order to find adverse FCC precedent merely confirms that the relief actually sought by CTIA is consistent with FCC decisions.

Remarkably, the opponents' discussion of Commission precedent fails to address in any substantive way the decision most pertinent to the CTIA petition – the preemption of state laws prohibiting line items in CMRS bills in the *Truth-in-Billing* proceeding. There the Commission held that state laws that prohibit the use of line item charges, thus requiring CMRS carriers to recover the costs previously recovered in the line item charges in other rates, "clearly and directly affect the manner in which the CMRS carrier structures its rates" and, therefore, are

---

[3] CTIA Petition at 31; *see also* Public Notice, "Petition for Declaratory Ruling Filed By CTIA," 70 Fed. Reg. 38928 (July 6, 2005).

preempted.[4] An application of a state law to eliminate a CMRS carrier's ETF as "unfair" would affect the CMRS carrier's rate structure in precisely the same manner[5] and therefore would be preempted to precisely the same extent.

The opponents rely heavily on a number of conflicting court decisions that appear to find that ETFs are not "rates charged" for purposes of Section 332. This reliance is misplaced. First, none of the cited decisions is in any way binding on the Commission. Second, their persuasive value is marginal at best given their procedural posture or lack of analysis.

The opponents also argue that preemption of state lawsuits challenging the reasonableness of ETFs pursuant to Section 332 is forestalled by the Act's so-called "savings clause." However, "[t]he act cannot be held to destroy itself."[6] Therefore, while Section 414 preserves existing state remedies, it clearly does not override the preemptive provisions of the Act. To read the statute otherwise would mean that ***no*** state-law challenge to CMRS rates would be preempted—a result that has already been rejected by the Commission.[7]

Finally, the opponents of preemption argue that ETFs should be regulated by the states because a perceived regulatory vacuum at the federal level leaves consumers vulnerable to

---

4

5 *See* Cingular Comments at 9-13; CTIA Petition at 11-19; Dobson Comments at 2-5; Nextel Comments at 2-7; Sprint Comments at 2-5; T-Mobile Comments at 7; Verizon Wireless Comments at 16.

6 *AT&T Co. v. Central Office Telephone, Inc.*, 524 U.S. 214, 228 (1998).

7 *In re Wireless Consumers Alliance, Inc. Petition for a Declaratory Ruling Concerning Whether the Provisions of the Communications Act of 1934, as Amended, or the Jurisdiction of the Federal Communications Commission Thereunder, Serve to Preempt State Courts from Awarding Monetary Relief Against Commercial Mobile Radio Service (CMRS) Providers (a) for Violating State Consumer Protection Laws Prohibiting False Advertising and Other Fraudulent Business Practices, and/or (b) in the Context of Contractual Disputes and Tort Actions Adjudicated Under State Contract and Tort Laws,* WT Docket No. 99-263, Memorandum Opinion and Order, 15 F.C.C.R. 17021, 17041, ¶ 39 (2000) [hereinafter *Wireless Consumers Alliance Order*].

predation. This argument fails as well. As an initial matter, the efficacy of the federal regulatory scheme for CMRS is not relevant to the question whether, as a matter of law, Section 332(c)(3)(A) preempts state regulation of ETFs. Moreover, the regulatory vacuum portrayed by the opponents of preemption does not, in fact, exist. CMRS rates and rate structures are regulated by the competitive market structure mandated by Congress and implemented by the FCC, backed by the Commission's administration of Sections 201, 202 and 208 – which remain the "bedrock consumer protection provisions" of the Act. It is abundantly clear that the market-based federal regulatory scheme has both benefited and protected CMRS subscribers.

State regulation of ETFs – whether by legislation, administrative rule, or class action lawsuit – cannot be reconciled with federal CMRS regulatory policy. The Commission's observations with respect to state regulation of CMRS line item charges are equally applicable here:

> The pro-competitive, deregulatory framework for CMRS prescribed by Congress and implemented by the Commission has enabled wireless competition to flourish, with substantial benefits to consumers. In this environment, Congress has directed that the rate relationship between CMRS providers and their customers be governed "by the mechanisms of a competitive marketplace," in which prospective rates are established by the CMRS carrier and customer in service contracts, rather than dictated by federal or state regulators. To succeed in this marketplace, CMRS carriers typically operate without regard to state borders and, in contrast to wireline carriers, generally have come to structure their offerings on a national or regional basis. Efforts by individual states to regulate CMRS carriers' rates through line item requirements thus would be inconsistent with the federal policy of a uniform, national and deregulatory framework for CMRS. Moreover, there is the significant possibility that state regulation would lead to a patchwork of inconsistent rules requiring or precluding different types of line items, which would undermine the benefits derived

> from allowing CMRS carriers the flexibility to design national or regional rate plans.[8]

ETFs are part of the "rate relationship between CMRS providers and their customers" no less than line-item charges. Therefore, Congressional policy requires that they, too, be "governed 'by the mechanisms of a competitive market place,' in which prospective rates are established by the CMRS carrier and customer in service contracts." Just as "[e]fforts by individual states to regulate CMRS carriers' rates through line item requirements thus would be inconsistent with the federal policy of a uniform, national and deregulatory framework for CMRS," so, too, would efforts by individual states to regulate CMRS carriers' rates through reduction or elimination of ETFs on "fairness" grounds be contrary to federal CMRS policy. Similarly, state class action lawsuits threaten to create a "patchwork of inconsistent rules" governing the use of ETFs that would undermine the benefits derived from permitting CMRS providers flexibility in national or regional rate plan design. Furthermore, applications of state law that restrict, prohibit, modify, or condition the use of ETFs would inevitably reduce or eliminate consumers' ability to secure the lower up-front and monthly charges associated with ETF-backed term contracts that have made wireless service accessible to so many.

The federal policy of regulating CMRS rates through competitive market forces, backed by Commission oversight, has yielded tremendous results.[9] Competition continues "to compel carriers to introduce innovative pricing plans and service offerings" and "to afford many

---

[8] *Second Truth-in-Billing Order,* 20 F.C.C.R. at 6468, ¶ 39 (footnotes omitted).

[9] *See generally Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services,* Ninth Report, 19 F.C.C.R. 20597 (2004) [hereinafter *Ninth CMRS Market Conditions Report*].

significant benefits to consumers."[10] Back-door regulation of CMRS providers' ETFs through state-law class action lawsuits is both unnecessary and harmful. Although such applications of state law are prohibited by Section 332(c)(3)(A), a number of courts have failed to enforce that prohibition. Therefore, the Commission must do so by granting the CTIA petition.

II. AS INTEGRAL ELEMENTS OF CMRS CARRIERS' RATE STRUCTURES, ETFS CONSTITUTE "RATES CHARGED" BY CMRS CARRIERS.

As thoroughly demonstrated in the CTIA petition itself and in the Carriers' initial comments, ETFs constitute both CMRS rates and elements of CMRS rate structures and thus are "rates charged" for CMRS within the meaning of Section 332(c)(3)(A).[11] ETFs are "rates" because they are an alternative charge for the provision of CMRS—that is, part of the price paid by subscribers for service provided under a term contract if they do not maintain their subscription for the full term—and they are also elements of CMRS carriers' term contract "rate structure," in which lower upfront charges (including handset charges) and monthly fees are offered in exchange for a term commitment backed by an ETF.[12] As noted in Cingular's initial comments, in the wireline context the Commission and the courts have long acknowledged that ETFs or their functional equivalents are an essential element of the rates charged in term-commitment service arrangements.[13]

---

[10] *Id.* ¶¶ 3, 4.

[11] CTIA Petition at 1-2, 11-19; Cingular Comments at 10-16; Dobson Comments at 2-4; Nextel Comments at 4-9, 18-20; Sprint Comments at 8-10; Suncom Comments at 6-13; T-Mobile Comments at 4-7, 12-15; Verizon Wireless Comments at 5-6, 9-17, 22-24.

[12] *See e.g.,* Cingular Comments at 3-4, 10-13; *see also* n.11, *supra.*

[13] Cingular Comments at 12 & n.26; *see, e.g., In re Ryder Communications, Inc v. AT&T Corp.*, 18 F.C.C.R. 13,603, 13,617, ¶ 32 (2003) ("In approving [early termination charges], the Commission recognized implicitly that they were a valid quid pro quo for the rate reductions

The opponents of preemption present a range of misconceived and quasi-factual arguments concerning the nature and purpose of wireless carrier ETFs in a failed attempt to show that they constitute not "rates charged" for, but "other terms and conditions" of, CMRS. Prominent in this litany are assertions that ETFs typically are fixed in amount no matter when during the contract term they are assessed and thus they have no relation to a carrier's costs; that they cannot be considered "rates charged" under Section 332 because they do not appear on customer bills; and that ETFs are devices used by wireless carriers solely to limit customer churn. Even accepting all of these statements as accurate characterizations of ETFs, not one of them proves that an ETF is not a "rate charged" by a wireless carrier.

A. ETFs Are "Rates Charged" For CMRS Even If They Do Not Vary To Reflect Subscriber-Specific Costs.

The opponents of preemption assert that a wireless carrier charge cannot be a "rate" for purposes of Section 332(c)(3)(A) unless it is "cost-based" – that is, unless it is set according to the actual cost to the carrier of some discrete aspect of service. UCAN, for example, argues that the customer who cancels wireless service during the eleventh month of a term contract has made up significantly more of the upfront costs associated with a term contract, yet still pays the same ETF as a customer canceling service in the early stages of the term contract. In UCAN's view, ETFs are not part of any rate structure because if they were, the ETF assessment would diminish over time.[14] Similarly, the comments filed by the Consumers Union argue that an ETF is not properly considered to be a rate, because a rate is a price paid for use of service. Because ETFs typically do not vary over the course of the contract, Consumer's Union argues, they are

---

included in the long-term plans.")(footnotes omitted); *MCI Telecommunications Corp. v. FCC,* 822 F.2d 80, 86 (D.C. Cir. 1987) (FCC reasonably found that cancellation and discontinuance charges for private line service were "rates").

[14] UCAN Comments at 4; Consumers Union Comments at 10-11.

not rates.[15] Consumers Union points out that a customer who fulfills the term of his or her contract is never assessed an ETF, regardless of how much service is used.[16] Because the ETF is not associated with the amount of service used, and because it does not vary over the term of the contract, Consumers Union argues the ETF is simply a penalty, and not a part of a wireless carrier's chosen rate structure.[17] NASUCA and AARP each make similar arguments, asserting that rates must be associated with a service and that ETFs are not associated with an element of service or designed to recover the cost of service.[18] WCA contends that ETFs are not rates or rate elements, contending that ETFs are rarely charged or paid and thus cannot represent compensation for handsets or accessories.[19]

The opponents of preemption essentially demand that wireless carriers engage in some form of cost recovery or rate structure justification as the price of proving that ETFs are rates charged under Section 332(c)(3)(A). This would be a pointless and irrelevant exercise. A rate is a rate because the wireless carrier charges it for the provision of CMRS, not because it has any direct relationship to a carrier's operating costs in general or specific relationship to the costs of serving a particular customer. The opponents' argument misses a fundamental point about wireless carrier rates and rate setting: under federal law and policy, rates are set by wireless carriers in response to competitive market conditions, consistent with the carriers' continuing obligations under Sections 201 and 202 of the Communications Act. As the Commission has observed, "[c]onsumers continue to contribute to pressures for carriers to compete on price and

---

[15] Consumers Union Comments at 10. *See also* AARP Comments at 11.

[16] Consumers Union Comments at 10.

[17] *Id.*

[18] NASUCA Comments at 21; AARP Comments at 9-10.

[19] WCA Comments at 9.

other terms and conditions of service by freely switching providers,"[20] so if consumers do not like the rates or rate structure of a particular wireless carrier's offerings, they can take their business elsewhere. If they believe that the competitive market has failed to produce reasonable rates, they can seek relief from the Commission by filing a complaint.

Taken to its ultimate logical conclusion, the opponents' argument is that to prove that the ETF is a rate, a wireless carrier must calibrate its ETF according to its cost of serving each specific subscriber. This, of course, is a totally unsupportable assertion that ignores basic principles of ratemaking and Commission precedent. In setting rates no carrier, not even a local exchange carrier ("LEC") still subject to rate of return regulation, is required to or does set its rates according to the actual cost of providing service to a particular customer.[21] Rather, mass market landline telephone rates are the same for all similarly situated customers, even in markets where the cost of constructing network facilities may be different depending upon the distance from the telephone company central office between customers. In the case of rate-of-return telephone company rates, the rate charged for phone service is essentially the average of aggregate operating costs plus an authorized rate of return. For telephone companies regulated under the price cap regime, the Commission long ago severed the relationship between carrier costs and rates charged for service.[22] The opponents to preemption are attempting to hold

---

[20] *Ninth CMRS Market Conditions Report,* 19 F.C.C.R. at 20601, ¶ 4.

[21] The only possible exceptions to this are individual case basis tariffs, contract arrangements or custom network arrangements that incumbent local exchange carriers may provide to large enterprise customers.

[22] *See, e.g., Cost Review Proceeding for Residential and Single-Line Business Subscriber Line Charge (SLC) Caps*, Order, 17 FCC Rcd 10868, 10873 at ¶ 8 (2002) ("By severing the direct link between authorized rates and realized costs, the price cap system was intended to create incentives for LECs to reduce costs and improve productivity, while maintaining affordable rates for consumers through the caps on prices."); *Policy and Rules Concerning Rates for Dominant Carriers*, Second Report and Order, 5 FCC Rcd 6786, 6787 at ¶ 1 (1990) ("By our

wireless carriers to a traditional cost-plus ratemaking model that no longer applies to price cap LECs and does not even apply to rate-of-return LECs in the manner the opponents suggest.

Carrier rates do not have to vary with time or the amount of service actually used in order to be considered rates. Flat rate structures are commonly used by a variety of telecommunications carriers subject to Commission oversight. It would be ridiculous to suggest, for example, that unlimited local wireline residential telephone service charged at $35 per line per month is not a rate charged for local telephone service. Wireless carrier "all you can eat" flat-rate access rate plans do not vary according to the minutes a customer actually uses in a particular month. Nor do the immensely popular "one rate" plans vary with the distance called. Yet pursuant to the opponents' reasoning, the rates charged for such plans would not be "rates" at all—an absurd result.

The assertion that a CMRS charge must be cost-based to be a "rate" cannot be reconciled with the federal scheme for market-based regulation of CMRS. The Commission has never subjected CMRS rates to cost-based regulation.[23] Thus, CMRS rates are based on the carriers' response to competitive market forces, rather than on the specific costs of service. Competition "compel[s] carriers to introduce innovative pricing plans and service offerings, and to match the pricing and service innovations introduced by rival carriers,"[24] which in turn requires

---

action today, the 'cost-plus' system of regulation will be replaced for the largest of the LECs on January 1, 1991, with an incentive-based system of regulation similar to the system we now use to regulate AT&T.")

[23] *See, e.g., Kiefer v. Paging Network,* 16 F.C.C.R. at 19,331 (In choosing to regulate CMRS rates through competitive market forces, "the Commission has not imposed cost-based rate regulations on CMRS providers."); *see also Developing a Unified Intercarrier Compensation Regime*, Further Notice of Proposed Rulemaking, 20 FCC Rcd 4685, Appendix C at 11 (2005) ("Regulators are far less familiar with the costing of other types of networks, such as wireless networks, that have not previously been subject to cost-based rate regulation.").

[24] *Ninth CMRS Market Conditions Report,* 19 F.C.C.R. 20597 at ¶ 4.

"experimentation with varying pricing levels and structures, for varying service packages, with various available handsets and policies on handset pricing."[25] This dynamic process simply cannot accommodate a requirement that CMRS carriers engage in cost-based rate setting and then show that each element of their rate structures recovers the specific, identifiable costs of serving an individual subscriber in order to prove that their rate structures constitute "rates" for purposes of preemption. The opponents' arguments relating to the cost-basis of ETFs presuppose such a rule, and they must therefore be rejected.

B. ETFs Are "Rates Charged" For CMRS Even If They Do Not Appear On Monthly Bills.

UCAN and Consumers Union suggest in their comments that only those charges that appear on customers monthly bills for wireless service can properly be considered to be rates charged by a wireless carrier and that, therefore ETFs cannot be "rates."[26] Another variation on this theme is the assertion that the fact that an ETF provision appears in the portion of the wireless carriers' service contracts labeled "Terms and Conditions" proves that the ETF is not a rate, but an illegal service cancellation penalty.

These arguments elevate form over substance. First, the assertion that the presence or absence of a charge on a monthly bill determines whether it is a "rate charged" for CMRS is patently absurd. The charges paid by prepaid subscribers for CMRS do not appear on any monthly bill, yet they are rates charged for CMRS. Activation charges may or may not appear on a monthly bill, yet they are rates charged for CMRS. AT&T Wireless reminded customers that they were subject to an ETF on *every* customer bill—in effect reminding the subscriber of the alternative rate that would be charged should he or she elect to cancel service prior to the

---

[25] *Id.* at ¶ 113.

[26] UCAN Comments at 3-4; Consumers Union Comments at 10-11.

expiration of the contract term,. Were AT&T Wireless's ETFs rates, but other carriers' ETFs not rates? Surely not. The presence or absence of an ETF or any other rate element on a monthly bill has no relevance to whether it constitutes a "rate charged" for wireless service.

Similarly, the fact that some carriers' service contracts describe ETFs in a section entitled "Terms and Conditions" is irrelevant to the essential nature of ETFs as rates elements. (Moreover, the CMRS carriers' advertisements and rate plans generally ***do*** set forth the alternative rate (ETF) on the same page as the monthly rates charged if the subscriber fulfills the contract term.) Finally, the fact that some carriers might characterize the ETF as "liquidated damages" – that is, an agreed-upon estimate of the actual damages caused by early termination – actually ***supports*** the characterization of the ETF as an alternative rate designed to recover the revenues lost due to early termination.

C. ETFs Are "Rates Charged" For CMRS Even If They Are Not Associated With A Specific Unit Of Service Or Time.

WCA asserts that "rate" has a clear meaning – "it is a charge: (1) for service, (2) imposed by unit of service or time."[27] WCA cites no source or authority for this "clear" definition. WCA then asserts that the ETF is not a charge for service, but for the discontinuation of service, and thus is not a rate. This cramped notion of what constitutes a rate does not withstand scrutiny. As stated in Cingular's initial comments, wireless customers have different service options at the point of sale. If they select a term plan with an ETF in order to get lower rates or a lower price for a handset, that is the rate structure they have selected. To suggest that the ETF cannot be part of the rate because it is not directly identified with a unit of service ignores that the units of

[27] WCA Comments at 8. The WCA then quotes the Black's Law Dictionary definition of rate as applied to public utilities which is not in conflict with the notion that an ETF is a rate component.

service provided under a term plan with an ETF are priced differently precisely ***because*** there is an ETF component to the rate structure.

D. The Fact That ETFs Influence Consumer Behavior Is A Characteristic Of Competitive Market Pricing And Does Not Detract From The Character Of ETFs As "Rates Charged" For CMRS.

The opponents assert that ETFs cannot be considered "rates charged" for CMRS because ETFs have the effect of reducing customer "churn." However, using pricing to attract and retain customers is a fundamental characteristic of a competitive market.[28] Thus, the lower activation charges, handset subsidies, and monthly service charges offered as part of an ETF-supported term contract rate plan are similarly devices used to attract subscribers and reduce churn. The fact that CMRS providers structure their prices to acquire and maintain customers in a competitive market does not strip those prices as of their character as "rates charged" for CMRS.[29]

---

[28] *See Ninth CMRS Market Conditions Report,* 19 F.C.C.R. at 20601, ¶ 4 ("competitive pressures continue to compel carriers to introduce innovative pricing plans and service offerings, and to match the pricing and service innovations introduced by rival carriers").

[29] The opponents imply that there is something nefarious about using pricing to attract and retain subscribers. There is not. When a subscriber agrees to pay an ETF in exchange for the lower upfront and monthly charges associated with term service contracts, he or she is assuming the risk of "buyers' remorse" when another, more attractive rate plan (or handset) comes along before the expiration of the contract term. Subscribers who wish to retain the ability to switch carriers without paying an ETF are free to subscribe to month-to-month plans, albeit at somewhat higher rates. What subscribers are not free to do is to obtain the lower rates and upfront costs provided in exchange for their agreement to pay an ETF in the event of early termination, and then renege on their bargain. *See In re Procedures for Implementing the Detariffing of Customer Premises Equipment and Enhanced Services (Second Computer Inquiry), American Tel. & Tel. Co. Request for Approval to Supplement the Capitalization of AT&T Information Systems in Connection with the Transfer of Embedded Customer Premises Equipment*, 100 F.C.C. 2d 1298, 1324-25, ¶ 39 (1985) (declining to eliminate or reduce termination charges in CPE lease contracts, stating that revenue produced for AT&T by termination charge "is exactly what the CPE lease customers agreed to when they made their

III. THE LEGAL AUTHORITY CITED BY THE OPPONENTS DOES NOT SUPPORT, MUCH LESS COMPEL, DENIAL OF THE CTIA PETITION.

It is clear that Section 332(c)(3)(A)'s prohibition of state regulation of "rates charged" for CMRS preempts any application of state law that would render CMRS carriers liable for damages or restrict their conduct based upon an assessment of the "reasonableness" of their rates or rate structures.[30] It is equally clear that "rates charged" includes CMRS carriers' ETFs.[31] Therefore, any application of state law that would restrict, prohibit, or condition the use of ETFs by CMRS carriers is preempted by Section 332(c)(3)(A).[32] Moreover, since a "patchwork of inconsistent rules" restricting or prohibiting ETFs would "undermine the benefits derived from allowing CMRS carriers the flexibility to design national or regional rate plans,"[33] the federal policy of a uniform, national and deregulatory framework for CMRS would require the Commission to preempt such applications of state law even in the absence of Section 332(c)(3)(A).[34]

The opponents of preemption argue that this Commission's decisions require a finding that ETFs are not "rates charged" for CMRS for purposes of Section 332(c)(3)(A). They also

---

decision to enter into a contract with AT&T rather than going with a month-to-month arrangement or buying from an AT&T competitor.").

[30] 47 U.S.C. § 332(c)(3)(A) ("***No*** state or local government shall have ***any*** authority to regulate . . . the rates charged" for CMRS.) (emphasis added); *Wireless Consumers Alliance Order*, 15 F.C.C.R. at 17,041, ¶ 39 ("Of course, a court will overstep its authority under Section 332 if, in determining damages, it does enter into a regulatory type of analysis that purports to determine the reasonableness of a prior rate or it sets a prospective charge for services.")

[31] *See* n.11, *supra* (citing CTIA Petition and Carriers' comments).

[32] CTIA Petition at 1-2, 11-19; Cingular Comments at 10-16; Dobson Comments at 2-4; Nextel Comments at 4-9, 18-20; Sprint Comments at 8-10; Suncom Comments at 6-13; T-Mobile Comments at 4-7, 12-15; Verizon Wireless Comments at 5-6, 9-17, 22-24.

[33] *Second Truth-in-Billing Order,* 20 F.C.C.R. at 6467, ¶ 35.

[34] *See id.*; *see also* Cingular Comments at 16-20; Sprint Comments at 10-18; Verizon Wireless Comments at 24-28.

argue that various court decisions "establish" that ETFs are not "rates" and that state lawsuits challenging ETFs are not preempted. They further assert that the Communications Act expressly "saves" state lawsuits that seek to regulate ETFs from preemption. Finally, AARP asserts that the CTIA petition requires resolution of disputed issues of material fact that preclude granting the relief requested. None of these assertions has merit.[35]

A. Commission Decisions Support The Conclusion That ETFs Are "Rates Charged" And That Section 332(c)(3)(A) Preempts State-Law Claims Challenging Them.

Some of the opponents argue that the Commission's decisions preclude the conclusion that ETFs are "rates charged" for CMRS for purposes of Section 332(c)(3)(A).[36] They do so by grossly distorting the relief requested by the CTIA petition and by ignoring the Commission's most recent and relevant analyses.

For example, WCA asserts that the CTIA petition requests a ruling that Section 332(c)(3)(A) preempts "***all*** state-law challenges, of ***any*** kind or character" to ETFs.[37] This premise allows WCA to argue[38] that the CTIA petition (a) seeks preemption of state laws that merely "have an impact on the costs of doing business for a CMRS operator," contrary to the

---

[35] NASUCA's reliance on a "presumption against preemption" is obviously misplaced. First, no presumption against preemption applies where, as in the case of CMRS rates, Congress has expressly preempted state regulation by statute. *See Egelhoff v. Egelhoff*, 532 U.S. 141, 146 (2001). Second, a presumption against preemption does not apply in a field, such as interstate wireless telecommunications "where there has been a history of significant federal presence." *United States v. Locke*, 529 U.S. 89, 108 (2000).

[36] AARP Comments at 15; Consumers Union comments at 6-8; NASUCA Comments at 21-22; WCA Comments at 30-37.

[37] WCA Comments at 1 (emphasis added).

[38] WCA Comments at 34.

Commission's holding in *Pittencrieff*;[39] (b) seeks to immunize CMRS providers from state contract laws in violation of the *Southwestern Bell Mobile Systems* decision;[40] and (c) seeks preemption of damages awards pursuant to state contract and consumer fraud laws, contrary to the Commission's holding in the *Wireless Consumers' Alliance Order*.[41] None of the foregoing is the relief actually sought by the CTIA petition—that is, a declaration that:

> (1) ETFs are "rates charged" for wireless services within the meaning of Section 332(c)(3)(A) and FCC precedent; and (2) any application of state law that purports to authorize a court or other tribunal to invalidate, modify, or condition the use or enforcement of ETFs based, in whole or in part, upon an assessment of the reasonableness, fairness or cost-basis of the ETF, or upon an application of state law prohibiting the use or enforcement of ETFs or so-called "liquidated damages" provisions, constitutes unlawful rate regulation and is therefore preempted by Section 332(c)(3)(A).[42]

It is clear from the CTIA petition that the ***only*** state laws affected by the requested relief are those laws that purport to regulate the "fairness" of ETFs. The contrast between the actual text of the CTIA petition and WCA's characterizations could not be more striking. Unlike the petition in *Pittencrieff*, the CTIA petition does not seek preemption of regulations that merely increase the costs of doing business. Nowhere does it request the "general exemption for the

---

[39] *In the matter of Petition of Pittencrieff Communications, Inc. for Declaratory Ruling Regarding Preemption of the Texas Public Utility Regulatory Act of 1995*, Memorandum Opinion and Order, 13 F.C.C.R. 1735 (1997), *petition for review denied sub nom. Cellular Telecommunications Industry Association v. FCC*, 168 F.3d 1332 (D.C. Cir. 1999).

[40] *Southwestern Bell Mobile Systems, Inc., Petition for a Declaratory Ruling regarding the Just and Reasonable Nature of, and State Challenges to, Rates Charged by CMRS Providers when Charging for Incoming Calls and Charging for Calls in Whole-Minute Increments*, Memorandum Opinion and Order, 14 F.C.C.R. 19898 (1999) [hereinafter *Southwestern Bell Mobile Systems Order*].

[41] *Wireless Consumers Alliance Order,* 15 F.C.C.R. 17021.

[42] CTIA Petition at 31; *see also* Public Notice, "Petition for Declaratory Ruling Filed By CTIA," 70 Fed. Reg. 38928 (July 6, 2005).

CMRS industry from the neutral application of state contractual or consumer fraud laws" referenced in the *Southwestern Bell Mobile Systems Order*. Nor does it assert that "[t]he indirect and uncertain effects of monetary damage awards" considered in the *Wireless Consumers Alliance Order* amount to rate regulation. The fact that WCA must mischaracterize the relief requested by the CTIA petition in order to argue that it is barred by these decisions merely confirms the opponents' inability to find ***any*** Commission precedent that is even remotely inconsistent with the requested ruling.[43]

The opponents' failure to address the thrust of the Commission's recent *Truth-in-Billing* order is equally telling. WCA characterizes the CTIA position as, at best, one that state regulation of ETFs "affects" rates, and then asserts that this is not sufficient to qualify the ETF itself either as a rate or part of a rate structure.[44] This argument is completely refuted by the *Second Truth-in-Billing Order*, in which the Commission found that state interference with CMRS carriers' line-item charges constituted prohibited rate regulation:

> [S]tate regulations that prohibit a CMRS carrier from recovering certain costs through a separate line item, thereby permitting cost recovery only through an undifferentiated charge for service, clearly and directly affect the manner in which the CMRS carrier structures its rates, and, therefore are preempted.[45]

As discussed in Cingular's initial comments, the same clear and direct effect on rates results from any state action aimed at the elimination or rollup of the ETF assessment into another

---

[43] It is obvious that the declaration sought by CTIA is entirely consistent with the three decisions cited by WCA. *Pittencrieff* held that state laws requiring CMRS providers to contribute to state universal service funds did not regulate rates merely because they increased CMRS providers' costs of doing business in the state.

[44] WCA Comments at 10.

[45] *Second Truth-in-Billing Order*, 20 F.C.C.R. 6448 at ¶ 31.

portion of the wireless carrier rate structure.[46] Unlike an award of money damages, the effects of such applications of state law on CMRS rates are neither "indirect" nor "uncertain"; to the contrary, they require adjustments to the CMRS carrier's rate structure in order to reduce or eliminate the ETF—precisely the sort of "mandatory corporate actions that are required as a result of legislative or administrative rate regulation activities."[47]

The manner in which applications of state law that restrict or prohibit the use of ETFs "clearly and directly affect" CMRS carriers' rate structures, and thus are preempted by Section 332, is illustrated by a judicial decision mistakenly relied upon by all of the opponents for the proposition that ETFs are not "rates."[48] In *Cedar Rapid Cellular Telephone Co. v. Miller,*[49] the court held that Section 332 would not so completely preempt anticipated state-law claims as to support federal jurisdiction over a declaratory judgment action. The holding itself is not persuasive because, in addition to the fact that, as explained below, such "complete preemption" determinations for purposes of federal court jurisdiction are not determinative of substantive preemption,[50] it was reversed by the Eighth Circuit (a fact overlooked by all of the opponents).[51]

[46] Cingular Comments at 9-10.

[47] *Wireless Consumers Alliance Order*, 15 F.C.C.R. 17021 at ¶ 23.

[48] See AARP Comments at 17; Consumers Union Comments at 7; NASUCA at 15; Suncom Plaintiff Comments at 33; UCAN Comments at 2, WCA Comments at 20.

[49] 2000 U.S. Dist. LEXIS 22624 (N.D. Iowa Sept. 15, 2000), *aff'd in part, rev'd in part, and vacated and remanded*, 280 F.3d 874 (8th Cir. 2002).

[50] *See* text accompanying notes 58-60, *infra*.

[51] *Cedar Rapids Cellular Tel. L.P. v. Miller,* 280 F.3d 874, 878 (8th Cir. 2002). The reversal is not reported by the LEXIS or Westlaw cite-checking services. The appeal and subsequent disposition are, however, reflected in the PACER docket entries for the district court proceeding, which are attached hereto as Ex. A. The reversal is also apparent from the text of the Eighth Circuit opinion, which is cited by at least one of the opponents in another context. *See* Consumers Union Comments at 6 n.9.

However, while the district court reached the wrong result, its analysis highlights the fact that state interference with ETFs "clearly and directly affects" CMRS rate structures.

The state law at issue limited enforcement of "executory contracts" of more than four months duration, including a limitation that allowed consumers an unrestricted right to cancel such contracts and a limitation on the sums vendors can obtain upon such cancellation.[52] In a passage quoted or cited by each of the opponents, the Court reasoned as follows:

> Moreover, it is equally arguable that enforcement of the ICCC . . . would merely require [the CMRS carriers] to structure their service agreements so that those agreements conform to the disclosure requirements mandated under the ICCC. This requirement might shift the point in the relationship between [the CMRS carriers] and consumers at which costs and charges would be incurred -- in that, e.g., ***[the CMRS carriers] hardware costs would be incurred by consumers "up front" rather than spread out incrementally throughout the life of the service agreement, or subsumed in cancellation or liquidation charges -- but ultimately, the "rates" charged by [the CMRS carriers] would remain the same***.[53]

In other words, the court found that although elimination of ETFs as required by the state law at issue would affect the CMRS carrier's ***rate structure*** by prompting adjustments to other rate elements, it held, erroneously, that the law did not result in prohibited rate regulation because, due to those adjustments, elimination of the ETF would not affect the carrier's overall rate ***level.*** While the *Cedar Rapids* court's holding is clearly wrong in view of this Commission's decisions establishing that state laws regulating CMRS providers' "rate structures" are preempted by Section 332(c)(3)(A), its description of the effect of elimination of ETFs on wireless carriers' rate structures is sound. This is ***precisely*** the effect the Commission described in the *Second Truth-in-Billing Order* when it determined that state laws that prohibit a CMRS line item

---

[52] *Cedar Rapids*, 2000 U.S. Dist. LEXIS 22624, at *5-*6.

[53] *Id.* at *21 (emphasis added).

"clearly and directly affect the manner in which the CMRS carrier structures its rates, and, therefore are preempted."[54] The court's erroneous preemption analysis is perhaps excused, in part, by the fact that the court did not have the benefit of the *Second Truth-in-Billing Order*. That excuse is not available to the opponents to the CTIA petition.

B. No Judicial Decision Precludes The Declaratory Ruling Sought By The CTIA Petition.

The opponents of preemption cite a number of decisions by federal district courts and state courts that purportedly hold that ETFs are not "rates charged" for CMRS and that state-law actions therefore are not preempted by Section 332(c)(3)(A).[55] As an initial matter, it must be emphasized that none of these decisions is in any way binding upon the Commission. Congress has delegated to the Commission "the authority to 'execute and enforce' the Communications Act, § 151, and to 'prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions' of the Act, § 201(b),"[56] subject only to direct appellate review. Therefore, contrary to the suggestions by some opponents, none of the decisions they cite "establishes"[57] the status of ETFs or the preemptive reach of Section 332(c)(3)(A) for purposes of this proceeding.

In addition to lacking any binding force, the decisions relied upon by the opponents are not persuasive. The federal cases considering the nature of ETFs turned on the question whether the preemptive force of the Communications Act was so absolute as to "completely preempt" all

[54] *Second Truth-in-Billing Order*, 20 F.C.C.R. 6448 at ¶ 31.

[55] *See* AARP Comments at 16-18; Consumers Union Comments at 7-8; NASUCA Comments at 13-18; UCAN Comments at 2-3; WCA Comments at 17-23.

[56] *National Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2699 (2005) (citing *AT & T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 377-378 (1999)).

[57] *See* WCA Comments at 23.

state laws and thus provide federal-question jurisdiction over a removed complaint that on its face asserts only state-law claims[58] or over a declaratory judgment action anticipating such a complaint.[59] Federal courts considering the question whether the "complete preemption" doctrine provides federal jurisdiction over a claim pleaded under state law must consider policies such as comity between state and federal courts and a presumption that Congress did not intend to divest state courts of jurisdiction to adjudicate claims brought under their own laws—policies far different from those that govern the question whether the Communications Act preempts state laws that purport to regulate an element of CMRS rate structures. As a matter of law, a judicial holding that the Communications Act does not "completely preempt" state law for purposes of federal subject matter jurisdiction on removal does not insulate the state law from preemption as a substantive matter.[60] The single on-point state court decision cited by WCA for the proposition

---

[58] *E.g., Phillips v. AT&T Wireless,* No. 4:04-cv-40240, 2004 U.S. Dist. LEXIS 14544 (S.D. Iowa July 29, 2004); *Carver Ranches Washington Part v. Nextel South Corp.,* No. 04-CV-80607 (S.D. Fla. Sept. 23, 2004) (attached to WCA Comments as Ex. A); *Kinkel v. Cingular Wireless, LLC,* No. 02-999, slip op. (S.D. Ill. Nov. 8, 2002) (attached to CTIA Petition as Ex. G); *Esquivel v. Southwestern Bell Mobile Sys., Inc.* 920 F. Supp. 713 (S.D. Tex. 1996).

[59] *Cedar Rapids Cellular Tel. L.P. v. Miller,* 2000 U.S. Dist. LEXIS 22624 (N.D. Iowa Sept. 15, 2000), *aff'd in part, rev'd in part, and vacated and remanded,* 280 F.3d 874 (8th Cir. 2002). As noted above, the district court's decision in *Cedar Rapids Cellular Telephone. L.P. v. Miller,* quoted at length by AARP, Consumers Union, NASUCA, the Suncom plaintiff, and WCA and cited by UCAN, was reversed and the decision vacated by the Eighth Circuit. *See* nn. 48-51 & accompanying text, *supra.*

The non-ETF decisions cited by the opponents either were decided on jurisdictional grounds or concerned challenges to the disclosure of various rates rather than the rates themselves, or both, and thus are not relevant to whether direct challenges an ETF pursuant to state laws that purport to govern the "reasonableness" or "fairness" of such charges constitute prohibited rate regulation.

[60] *See, e.g., Bryceland v. AT&T Corp.*, 122 F. Supp. 2d 703, 709 (N.D. Tex. 2000) (plaintiffs' state-law claims were an attack on CMRS rates and thus were preempted by the Communications Act, but the complaint was nevertheless not removable to federal court under the "complete preemption" doctrine). The distinction between the "complete preemption"

that ETFs are not "rates charged" is a one-paragraph, handwritten minute order that is completely devoid of analysis.[61]

At bottom, however, the courts that have held that ETFs are not part of the "rates charged" for CMRS have misread the statute, misunderstood the nature of CMRS rates structures, or both. In contrast, the courts rendering the *Aubrey*, *Redfern, Chandler,* and *Consumer Justice Foundation* decisions cited in the CTIA petition actually foreshadow the Commission's analysis in the *Truth-in-Billing* proceeding[62] – *i.e.,* reasoning that because state laws prohibiting particular charges would require carriers to adjust their rate structures, such laws regulate the "rates charged" for CMRS and are preempted by Section 332(c)(3)(A).[63]

---

doctrine and "ordinary" preemption is discussed in *Smith v. GTE Corp.*, 236 F.3d 1292 (11th Cir. 2001), a case that the opponents themselves cite:

> Although the complete preemption doctrine does not apply in this case, we recognize that the use of the term "preemption" in this context has caused "a substantial amount of confusion between the complete preemption doctrine and the broader and more familiar doctrine of ordinary preemption." *BLAB*, 182 F.3d at 854. For that reason, it is worth pointing out that: "complete preemption functions as a narrowly drawn means of assessing federal removal jurisdiction, while ordinary preemption operates to dismiss state claims on the merits and may be invoked in either federal or state court. *Id.* at 854-55.

Smith v. GTE Corp., 236 F.3d at 1312. The converse, however, is not true. A finding of "complete preemption" necessarily includes a finding of "ordinary" or "defensive" preemption.

[61] *Hall v. Sprint*, No. 04L113 (Ill. 3d Cir. Ct. Aug. 10, 2004) (attached to WCA Comments).

[62] *See* nn. 45-53 & accompanying text, *supra.*

[63] *See* CTIA Petition at 13-14 & nn. 44-46 (discussing *Aubrey v. Ameritech Mobile Communications, Inc.*, No. 00-CV-75080, 2002 U.S. Dist. LEXIS 15918 (E.D. Mich. June 14, 2002); *Redfern v. AT&T Wireless Servs.,* Civ. No. 03-206-GPM, 2003 U.S. Dist. LEXIS 25745 (S.D. Ill. June 16, 2003); *Chandler v. AT&T Wireless Servs.,* 2004 U.S. Dist. LEXIS 14884 (S.D. Ill. July 21, 2004); *Consumer Justice Foundation v. Pacific Bell Tel. Co.*, Case No. BC 214554 (Cal. Super. Ct. L.A. Co. July 29, 2002) (attached as Ex. D to CTIA Petition).

C. The "Savings Clause" Of The Act Does Not Save Applications Of State Law Challenging The Fairness Or Legality Of ETFs From Preemption.

The opponents assert that Section 414 of the Act, which provides that "[n]othing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies,"[64] is evidence that Congress did not intend to preempt the application of state laws that would restrict or eliminate the ability of CMRS providers to include ETFs in their rate structures. They are mistaken.

Such a broad interpretation of the savings clause cannot possibly be reconciled with Congress's statutory scheme for CMRS regulation. As the Commission has observed, "[u]nder accepted principles of statutory construction, . . . the savings clause cannot preserve state law causes of action or remedies that contravene express provisions of the Telecommunications Act."[65] To read Section 414 as permitting state courts and juries to regulate ETFs according to state law would defeat Section 332(c)(3)(A)'s absolute proscription against *any* regulation of CMRS rates or rate structures by the states.

D. The CTIA Petition Does Not Require Resolution Of Disputed Issues Of Material Fact.

AARP makes a desultory procedural argument that the CTIA petition cannot be granted because there are material facts in dispute.[66] AARP claims that "CTIA's entire case is premised on its factual assertion that ETFs recover CMRS providers' costs of providing wireless service to

---

[64] 47 U.S.C. § 414.

[65] *Wireless Consumers Alliance Order,* 15 F.C.C.R. at 17041, ¶ 39 (2000); *accord AT&T Co. v. Central Office Tel., Inc.*, 524 U.S. 214, 228 (1998) ("The [Communications] [A]ct cannot be held to destroy itself."); *Bastien . AT&T Wireless Servs., Inc.,* 205 F.3d 983, 987 (7th Cir. 2000 (declaring that Section 414 cannot be read in a manner that would "abrogate the very federal regulation of mobile telephone providers that the Act intended to create") (citation omitted).

[66] AARP Comments at 18-19.

their customers and therefore are 'rates' within the meaning of § 332(c)(3)."[67] As a threshold matter, it is undisputed that CMRS carriers must recover their cost of providing service from their customers. To the extent AARP seeks to create the impression of controversy regarding this fact, AARP is simply wrong. More to the point, AARP cannot transform CTIA's argument into a factual assertion merely by terming it such. CTIA's petition asserts that a certain type of contract structure represents a rate which may not be regulated by the states. CTIA's petition thus "reveal[s] one relatively concrete controversy that can be resolved through a declaratory ruling."[68] AARP's contention that the Commission requires a comprehensive factual record detailing the rate structure and cost structure of "each" CMRS provider is plainly overreaching.[69] AARP appears to suggest the Commission could not resolve this issue without launching into a full-blown rate case of the kind that would be inappropriate for a CMRS carrier. Exhaustive fact finding and the creation of the in-depth record advocated by AARP is not necessary to determine that, as a general matter, ETFs are rates charged by CMRS providers within the meaning of Section 332.[70]

---

[67] *Id.* at 19.

[68] *American Network, Inc. Petition for Declaratory Ruling Concerning Backbilling of Access Charges*, Memorandum Opinion and Order, 4 FCC Rcd 550, 552 at ¶ 19 (1989).

[69] AARP Comments at 19.

[70] The argument advanced by Debra Edwards, the plaintiff in the SunCom case, in Docket No. 05-193 is thus inapplicable to the CTIA petition. Edwards argues that the question of whether a contractual obligation exists is a matter for state courts. But, as Edwards stresses, "the Edwards case is about SunCom's failure to adhere to its own contract form." As Edwards repeatedly asserts, "the more narrow issues in Docket 05-193 do not involve claims that early-termination fees are invalid, that courts can or should modify or condition early-termination fees, or that the use or the enforcement of early termination fees should be foreclosed – or even limited…." To the extent, therefore, that the resolution of specific disputed questions of fact is necessary to the resolution of the SunCom petition, those specific questions are separate and distinct from the general questions of law and policy at issue in Docket 05-194.

IV. ASSERTIONS THAT ETFS ARE INHERENTLY UNFAIR OR INSUFFICIENTLY REGULATED DO NOT PERMIT STATES TO REGULATE CMRS RATE STRUCTURES.

Several opponents of preemption appear to suggest that state law or common law should apply to ETFs because wireless carriers' rates are inherently unfair, and that, therefore, state law, common law or equitable principles should be permitted to fill the "void" created by federal rate deregulation. This argument fails on a number of levels. As an initial matter, the question whether states should regulate any aspect of the "rates charged" by CMRS carriers has already been conclusively answered in the negative by Congress. Whether federal CMRS regulatory policy should or should not permit carriers to charge ETFs is irrelevant to whether ETFs are in fact rates or elements of rate structures. Moreover, the federal regulatory scheme for CMRS does not leave consumers unprotected or CMRS rates unregulated. The Commission's complaint procedures provide consumers with a straightforward means of resolving ETF-related complaints. The only parties disadvantaged by consumer recourse to FCC procedures are the advocacy groups and plaintiffs' attorneys who subsist on awards of costs and fees under state law. With respect to CMRS rates, the Commission, at the direction of Congress, has replaced both traditional rate regulation and the polyglot of conflicting state laws with a uniform, nation-wide scheme of market-based regulation, backed by FCC enforcement of Sections 201 and 202 of the Act. This market-based regulatory scheme has provided consumers with the best means of avoiding service offerings that include ETFs they deem to be "unfair" — the ability to take their business elsewhere.[71]

---

[71] UCAN's comments contain assertions relating to Cingular and former AT&T Wireless customers, UCAN Comments at 5-14, which are not relevant to the legal issues raised by the CTIA petition. UCAN's comments also assert that dealers may charge Cingular customers fees for canceling contracts for equipment the dealers sell on their own account. UCAN Comments at

A. The Commission's Complaint Procedures Provide Consumers With A Straightforward Means Of Resolving ETF-Related Complaints.

Several opponents suggest that consumers have no effective recourse at the Commission for relief from truly unreasonable or oppressive ETFs. This is plainly incorrect. The Commission by law must accept and investigate complaints regarding carrier violations of the Act. Section 208 of the Act provides that "[a]ny person, any body politic or municipal organization, or State commission" may file a complaint with the Commission complaining "of anything done or omitted to be done by any common carrier subject to this Act, in contravention of the provisions thereof."[72]

Parties with Communications Act grievances against carriers may file either informal or formal complaints under Section 208.[73] A person filing an informal complaint need only provide a name, address and telephone number, identify the carrier who is the target of the complaint, give a statement of the facts, and a statement of the relief being sought.[74] Carriers are then given the opportunity to respond to each complaint and resolve the issue complained of directly. In the event a consumer is not satisfied with the resolution of an informal complaint, the consumer may still proceed by filing a formal complaint against the carrier that the Commission will resolve.[75]

The Commission quite deliberately makes an effort to make the process of filing an informal complaint simple. The Commission's website stresses that "[f]iling a complaint with

---

14-17. The relief requested in the CTIA petition does not extend to such fees, and they are similarly irrelevant to this proceeding.

[72] 47 U.S.C. § 208(a).

[73] 47 C.F.R. § 1.711.

[74] 47 C.F.R. § 1.716.

[75] 47 C.F.R. § 1.717.

the FCC is EASY."[76] Consumers may file complaints in whatever manner is most convenient for them, including by submitting a complaint electronically on the Commission's website, by regular mail, by e-mail, or by fax. The Commission's website provides a hyperlink to a straightforward form by which consumers may submit complaints electronically, as well as a link to the Commission's e-mail mailbox for complaints. The Commission's website provides the mailing address for complaints and a toll-free fax number, as well as general instructions concerning the type of information a consumer should include in their complaint. The Commission's website also provides toll-free telephone and TTY numbers through which customers may speak to Consumer and Mediation Specialists about complaints Monday through Friday, from 8:00 am to 5:30 pm.[77] Thus, the idea that it is cumbersome or difficult for members of the public to submit complaints to the Commission and have them dealt with is vastly overblown and wrong.

Perhaps what motivates some opponents of preemption in their plain preference for state court rather than Commission review is that state courts provide a source of ready attorneys' fees and potentially treble damage awards. Plaintiffs' class action attorneys have their fees paid by the defendant if they win, or even if they settle. In contrast, the Commission cannot and does not award attorneys fees or costs to the prevailing party in a complaint proceeding.[78] Whatever the

---

[76] Consumer and Governmental Affairs Bureau, *Filing a Complaint*, http://www.fcc.gov/cgb/complaints.html (last visited August 15, 2005) (emphasis in original).

[77] *Id.*

[78] "The Act and the Commission's rules do not allow the Commission to award attorney's fees or costs." *Staton Holdings, Inc. d/b/a Staton Wholesale, Complainant, v. Mills Fleet Farm, Inc., Defendant*, Order, 18 FCC Rcd 12787, 12791, ¶ 13 (2003), *citing Multimedia Cablevision, Inc. v. Southwestern Bell Telephone Co.*, Memorandum Opinion and Hearing Designation Order, 11 FCC Rcd 11202, 11208 (1996); *Comark Cable Fund III*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 100 FCC 2d 1244, 1257, ¶ 31 n.51 (1985).

motives of the opponents of preemption in preferring state court venues, however, it is a misrepresentation of the facts to suggest that the Commission is not capable of processing formal or informal complaints concerning the application of ETFs in particular circumstances.

B. CMRS ETFs Are Regulated By Competitive Market Forces, Backed By The Commission's Enforcement Of Sections 201 And 202 Of The Act.

Congress in the Omnibus Budget Reconciliation Act of 1993 ("1993 Act")[79] provided some measure of regulatory relief for wireless carriers, but certainly did not provide for total deregulation of the CMRS market, nor did it eliminate federal oversight of wireless carrier rates and practices. Even the opponents of preemption do not argue that Congress in 1993 evidenced a policy preference in favor of a unified federal regulatory framework for wireless services – they simply disagree as to the scope of this policy. This federal framework very deliberately stresses competition as the preferred form of regulation in the first instance in place of government regulation. Intervention by the Commission becomes necessary only in the event of proven market failure. Thus, there is no regulatory "vacuum" to be filled by state law review or backdoor regulation of the reasonableness of ETF rates.[80]

In the 1993 Act, Congress created a process whereby CMRS carriers were classified for regulatory purposes as common carriers subject to Title II regulation, except where the Commission, in its implementation of the Act and applying statutory criteria, determined that Title II regulation was unnecessary. Notably, Congress in 1993 did not provide the Commission with the flexibility to forbear from regulation of CMRS carriers' rates and practices:

---

[79] Omnibus Budget Reconciliation Act of 1993, H.R. 2264, Pub. L. No. 103-66, 107 Stat. 312.

[80] *See, e.g., Orloff v. FCC*, 352 F.3d 415, 419 (2003); *Kiefer v. Paging Network, Inc.*, Memorandum Opinion and Order, 16 F.C.C.R. 19,129, 19,131 (2001); *Southwestern Bell Mobile Systems Order,* 14 F.C.C.R. 19898.

> In prescribing or amending any such regulation, the Commission may not specify any provision of section 201, 202 or 208, and may specify any other provision only if the Commission determines that – (i) enforcement of such provision is not necessary in order to ensure that the charges, practices, classification, or regulations for or in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory; (ii) enforcement of such provision is not necessary for the protection of consumers; and (iii) specifying such provision is consistent with the public interest.[81]

In implementing the revised statutory provisions of Section 332, the Commission observed that its mission was broad – "Congress has replaced traditional regulation of mobile services with an approach that brings all mobile service providers under a comprehensive, consistent regulatory framework and gives the Commission flexibility to establish appropriate levels of regulation for mobile radio services providers."[82] This statement by the Commission regarding the scope of the Congressional preemption is not at all consistent with the opponents' arguments, and particularly the assertion by NASUCA that the scope of Congressional preemption was narrow, namely that only wireless carrier rate and entry regulation are preempted under the 1993 Act.[83] The preemption was far broader, as the Commission has recognized.

Indeed, the Commission expressly recognized that it would be the sole regulatory agency to set the ground rules for future wireless carrier conduct. For example, in determining that it was appropriate to forbear from a tariffed service environment, the Commission observed that tariffing was unnecessary because "[c]ompliance with Sections 201, 202 and 208 is sufficient to

---

[81] 47 U.S.C. Section 332(c)(1)(A).

[82] *Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, Second Report and Order, 9 F.C.C.R. 1411, 1417 ¶ 12 (1994). [hereinafter *Second CMRS Report and Order*].

[83] NASUCA Comments at 9-10.

protect consumers."[84] In other words, it was and is the Commission's intent to protect consumers by reliance on the informal and formal complaint mechanisms available under Section 208 of the Act, through its application of the broad, flexible standards of Sections 201 and 202 to consumer complaints addressing wireless carrier rates and practices.

The Commission has confirmed the continuing vitality of its exclusive regulatory oversight of wireless carrier rates and practices on several occasions. In 1998, the Commission rejected a request for forbearance from, among other things, Sections 201 and 202 of the Act made by the Personal Communications Industry Association ("PCIA") on behalf of broadband Personal Communications Service ("PCS") licensees. PCIA invoked Section 10's provisions to press for forbearance from regulation under Sections 201 and 202 of the Act on behalf of PCS carriers as new market entrants competing with established cellular carriers. Section 10, enacted in the Telecommunications Act of 1996, provided the Commission with broader discretion, subject to three statutory criteria that closely track those in Section 332(c)(1)(A), to forbear from all forms of Title II regulation over telecommunications services and carriers.[85]

---

[84] *Second CMRS Report and Order*, 9 F.C.C.R. at 1479, ¶176. The FCC noted that "In the event that a carrier violated Section 201 or 202, the Section 208 complaint process would permit challenges to a carrier's rates or practices and full compensation for any harm due to the violations of the Act. Although we will forbear from enforcing our refund and prescription authority, described in Sections 205 and 205, we do not forbear from Sections 206, 207 and 209, so that successful complainants could collect damages." *Id.*

[85] Section 10 is modeled closely on the previous forbearance authority provided in Section 332 but it goes even further in allowing the Commission to forbear from regulating telecommunications carriers or services notwithstanding Section 332(c)(1)(A) of the Act if the Commission determines that – "(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of such regulation of provision is not necessary for the protection of consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest." 47 U.S.C. § 160.

In reviewing the PCIA forbearance petition, the Commission confirmed the centrality of Sections 201 and 202 – even in a market-regulated rate environment – to consumer protection. Indeed, the Commission stated that these statutory provisions constitute the "bedrock consumer protection" provisions that apply to wireless carriers. Noting that these provisions set forth broad standards of conduct, the Commission observed that the "existence of the broad obligations, however, is what gives the Commission the power to protect consumers by defining forbidden practices and enforcing compliance. Thus, Sections 201 and 202 lie at the heart of consumer protection under the Act."[86] Critically, the Commission also stated:

> if we were to forbear from enforcing sections 201 and 202, parties would likely turn to the courts for relief from perceived unjust and unreasonable carrier practices. We believe that since the courts lack the Commission's expertise, developed over decades, in evaluating carriers' practices, carriers would face inconsistent court decisions and incur unnecessary costs. This could result in consumers receiving differing levels of service and protection depending upon the jurisdiction in which they live, contrary to the intent of Congress in amending section 332.[87]

In subsequent decisions, the Commission has increasingly underscored the federal policy of regulating CMRS rates by competitive market forces, backed, if necessary, by enforcement of Sections 201 and 202. In *Southwestern Bell Mobile Systems,* the Commission emphasized that competitive forces best govern the relationship between CMRS providers and their customers, although the reasonableness of industry practices is still subject to review pursuant to Section 201(b).[88] The Commission reiterated its commitment to this regulatory structure in *Kiefer v.*

---

[86] *Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance for Broadband Personal Communications Services*, 13 F.C.C.R. 16857 at ¶ 15 (1998) [hereinafter *PCIA Forbearance Order*].

[87] *Id.* at ¶ 30. (footnotes omitted).

[88] *Southwestern Bell Mobile Systems Order,* 14 F.C.C.R. at 19902 (state regulation of rounding practices preempted).

Paging Network, where it found that, since the Commission has regulated CMRS through market forces rather than cost-based rate regulation, a CMRS carrier's late fee was neither unjust nor unreasonable merely because it was not based on an estimate of the carrier's actual losses.[89] Most recently, in *Orloff v. Vodafone Airtouch Licenses*, the Commission heard, and rejected, a challenge under Sections 201 and 202 to a wireless carrier's negotiation of rate concessions with individual customers in response to competitive pressures.[90]

Thus, the Commission has consistently (a) emphasized that wireless rates are to be regulated by competitive market forces in the first instance, (b) squarely rejected the notion that it is incapable of protecting wireless consumers by using its statutory tools, and (c) confirmed that courts are the wrong forum for judgments concerning the reasonableness of wireless carriers' rates and practices.

C. The Competitive Market Protects Consumers From "Unfair" ETFs By Providing Alternative Rate Structures.

It is manifestly clear that the federal market-based, deregulatory approach has both benefited and protected consumers. It is undisputed that the major national wireless carriers each offer a range of rate and service plans – they plainly recognize that potential customers may not be similarly situated in their service usage and needs. Also undisputed is that national wireless carriers offer service and rate plans that do not feature an ETF rate component. Cingular, for example, offers one and two year term contracts with ETFs, but Cingular also offers a "no-commitment" term contract, as well as prepaid plans such as the GoPhone® "Pay As You Go" and "Pick Your Plan" offerings. Cingular widely advertises the availability of these different

---

[89] *Kiefer v. Paging Network*, 16 F.C.C.R. at 19,131.

[90] *Orloff v. Vodafone Airtouch Licenses LLC*, 17 F.C.C.R. 8987 (2002), *petition for review denied sub nom. Orloff v. FCC*, 352 F.3d 415 (2003).

plans both in mass media advertisements and at the point of sale. A new subscriber that prefers a term plan to a prepaid plan but also prefers to maintain the flexibility to cancel service at any time has no commitment, and thus is charged higher rates than those made available in a term plan that contains an ETF that represents the customer's commitment to maintain service during the term of the contract.

Thus, in today's market, wireless subscribers have a choice: they may subscribe to CMRS on a month-to-month basis, without commitment or ETF, or they may secure lower activation and monthly charges and/or handset prices by entering into a term contract with an ETF—that is, by agreeing to pay either the monthly charges for the full term of the contract or the monthly charges until their early termination plus the ETF.[91] The fact is that term plans with ETFs consistently are more popular with the public than are no-commitment plans.[92] This

---

[91] Thus the opponents' predictions of disaster upon granting the CTIA petition, such as WCA's ominous warning that a carrier could impose a $1 million ETF on customers with impunity, are wildly overblown. WCA Comments at 40. Market-based regulation means consumers know they have choices when they shop for wireless service: if the ETF included in one carrier's service plan is too high, they can choose either a month-to-month plan or a term contract plan with a lower ETF from another carrier. In the event of competitive market failure—for example, if there were only one provider serving the customer's location—the Commission would be available to police unreasonable rates pursuant to Sections 201, 202 and 208 of the Act. *See, e.g. Southwestern Bell Mobile Systems Order,* 14 F.C.C.R. at 19904-05, ¶ 15. Moreover, if a carrier attempted to impose an ETF in a case where the ETF had not been disclosed or was not part of the contract, the subscriber would have recourse to traditional state consumer protection and contract laws.

[92] The opponents naively seem to assume that consumers will continue to have access to the reduced activation charges, handset prices, and monthly rates offered in conjunction with an ETF-backed term contract even if the ETF is subject to state regulation, modification, or abolition. This is of course incorrect. There is an obvious, fundamental link between a customer's willingness to make and honor a term commitment and the lower rates for service and equipment associated with that commitment. If a wireless carrier cannot forecast the same revenues associated with a no-commitment plan as it can with a term plan that contains an ETF, then it makes no economic sense for a wireless carrier to charge the same rate per minute of access or for equipment purchased under these dissimilar plans. The ETF is a mechanism that

shaping of CMRS rate structures by competition and consumer choice is ***precisely*** the process contemplated by the federal policy of market-based regulation of CMRS rates[93] – a policy that is utterly incompatible with the patchwork regulation by state statute, rule and class action verdict demanded by the opponents.

V. CONCLUSION

The record in this proceeding amply supports granting the ruling requested by the CTIA petition. The comments filed by Cingular, Dobson Communications, Nextel, Sprint, Suncom, T-Mobile, US Cellular, and Verizon Wireless (the "Carriers") demonstrate that ETFs are both "rates" and elements of CMRS carriers' "rate structures," that state rate regulation of ETFs is therefore preempted by 47 U.S.C. § 332(c)(3)(A); that applications of state laws challenging ETFs on the basis of "fairness" or "reasonableness" constitute rate regulation; and that such applications of state laws are therefore preempted. The Carriers' comments also demonstrate that, even if ETFs are not "rates charged" for CMRS and thus fall outside the scope of Section 332(c)(3)(A), the Commission should declare such applications of state law preempted. Piecemeal regulation of ETFs by individual states is inconsistent with the federal policy of a uniform, national and deregulatory framework for CMRS, and to permit state regulation of ETFs by lawsuit would undermine the benefits derived from allowing carriers to design and implement ETF-based rate structures on a nationwide or regional basis.

---

permits consumers the benefits of lower upfront and monthly charges in exchange for the commitment to pay an ETF if the consumer terminates service prematurely.

[93] *See Ninth CMRS Market Conditions Report,* 19 F.C.C.R. at 20601, ¶ 4 ("Indicators of market performances show that competition continues to afford many significant benefits to consumers. Consumers continue to contribute to pressures for carriers to compete on price and other terms and conditions of service by freely switching providers . . . .").

In contrast, the opponents of preemption have provided no basis for denial of the CTIA's requested declaration. They have failed to show that ETFs are anything other than rates, or elements of CMRS rate structures, which would clearly be affected by application of state laws to restrict, prohibit, or condition their use by CMRS carriers. They have failed to cite any legal authority that prevents the Commission from construing Section 332(c)(3)(A) in a manner consistent with Congressional intent and the federal policy for regulation of CMRS. Nor have they shown that regulation of ETFs through competitive market forces, backed by the Commission's oversight and enforcement authority, is insufficient to protect consumers.

For all of the foregoing reasons, and for the reasons stated in the CTIA petition and in the initial comments filed by Cingular and the other carriers, the CTIA petition should be granted in its entirety.

Respectfully submitted,

CINGULAR WIRELESS LLC

/S/ DAVID G. RICHARDS
J.R. CARBONELL
CAROL L. TACKER
DAVID G. RICHARDS
5565 Glenridge Connector, Suite 1700
Atlanta, GA 30342
(404) 236-5543
Its Attorneys

August 25, 2005

EXHIBIT A

Home PACER Opinions Help

General Docket

US Court of Appeals for the Eighth Circuit

Docket as of July 29, 2002 8:50 pm Page 1

00-3727 Cedar Rapids, et al v. Thomas Miller

Court of Appeals Docket #: 00-3727 Filed: 11/16/00
Cedar Rapids, et al v. Thomas Miller
civil - private - none
Appeal from: U.S. DISTRICT COURT, NORTHERN IOWA

- -

Lower court information:

District: 0862-1 : C00-58-MJM
Trial Judge: Michael J. Melloy, U.S. Circuit Judge
Court Reporter: Tracy Lampe, Court Reporter
Date Filed: 4/11/00
Date order/judgment: 9/15/00
Date NOA filed: 11/9/00

- -

Fee status: paid

- -

Current cases:

	Lead	Member	Start	End
Consolidated:	00- 3727	00- 3728	11/16/00	

Docket as of July 29, 2002 8:50 pm Page 2

00-3727 Cedar Rapids, et al v. Thomas Miller

- -

Counsel Information

CEDAR RAPIDS CELLULAR TELEPHONE, L.P.
Plaintiffs - Appellants

Bret Alan Dublinske
515-246-4546
[COR LD NTC ret]
DICKINSON & MACKAMAN
699 Walnut Street
1600 Hub Tower
Des Moines, IA 50309
515-244-2600

Carter G. Phillips

	[COR LD NTC ret] SIDLEY & AUSTIN 1501 K Street, N.W. Washington, DC 20005 202-736-8178
DAVENPORT CELLULAR TELEPHONE COMPANY Plaintiffs - Appellants	Bret Alan Dublinske (See above) [COR LD NTC ret]
WWC LICENSE, LLC Plaintiffs	
IOWA WIRELESS SERVICES, L.P. Plaintiffs	
v.	
THOMAS MILLER, Sued as Thomas J. Miller, individually, in his official capacity as Attorney General of Iowa and Administrator of the Iowa Consumer Credit Code Defendant - Appellee	Julie F. Pottorff 515-281-3349 [COR LD NTC ag] ATTORNEY GENERAL'S OFFICE Hoover Building Second Floor Des Moines, IA 50319-0001 515-281-5164 Raymond H. Johnson 515-281-5976 [COR LD NTC ret] IOWA DEPARTMENT OF JUSTICE Hoover State Office Building Des Moines, IA 50319

Docket as of July 29, 2002 8:50 pm Page 3

00-3727 Cedar Rapids, et al v. Thomas Miller

- -

Caption

CEDAR RAPIDS CELLULAR TELEPHONE, L.P.; DAVENPORT CELLULAR TELEPHONE COMPANY;

Plaintiffs - Appellants

WWC LICENSE, LLC; IOWA WIRELESS SERVICES, L.P.

Plaintiffs

v.

THOMAS MILLER, Sued as Thomas J. Miller, individually, in

his official capacity as Attorney General of Iowa and
Administrator of the Iowa Consumer Credit Code

Defendant - Appellee

Docket as of July 29, 2002 8:50 pm Page 4

00-3727 Cedar Rapids, et al v. Thomas Miller

11/16/00	Civil Case Docketed. Dist. Ct. Office: Cedar Rapids (llb) [00-3727]
11/16/00	CERTIFIED copies notice of appeal, docket entries, and judgment dated 9/15/00 and order 10/11/00 from district court [00-3727] [1331139] (llb) [00-3727]
11/16/00	BRIEFING SCHEDULE: [00-3727, 00-3728] Method of apndx due on 11/27/00 in 00-3727, in 00-3728 DR aplnt due on 11/27/00 in 00-3727, in 00-3728 DR aplee due on 12/6/00 in 00-3727, in 00-3728 Transcript due on 12/26/00 in 00-3727, in 00-3728 Apndx due on 1/5/01 in 00-3727, in 00-3728 Aplnt brief due on 1/5/01 in 00-3727, in 00-3728 Aplee brief due on 2/5/01 in 00-3727, in 00-3728 reply brief due on 2/20/01 in 00-3727, in 00-3728 (llb) [00-3727 00-3728]
11/20/00	DESIGNATION of record received from Appellants Cedar Rapids in 00-3727, Appellants Davenport Cellular in 00-3727 . Type of appendix: separate [00-3727] (lmt) [00-3727]
12/4/00	APPEARANCE for appellee, attorney Julie F. Pottorff [00-3727] [1337492] (lmt) [00-3727]
12/8/00	DESIGNATION of record received from Appellee Thomas Miller in 00-3727 . separate [00-3727] (lmt) [00-3727]
12/12/00	APPEARANCE for appellant, attorney Carter G. Phillips [00-3727] [1340198] (lmt) [00-3727]
12/14/00	MOTION of aplnt, Cedar Rapids in 00-3727, Davenport Cellular in 00-3727, WWC License in 00-3728 , for extension of time to file brief until 2/5/01 . [00-3727, 00-3728] [1340860] w/service 12/13/00 (lmt) [00-3727 00-3728]
12/15/00	ORDER filed:granting in part appellant motion for extension of time to file brief [1340861] in 00-3727, 00-3728 Aplnt brief now due on 1/26/01 in 00-3727, in 00-3728 (lmt) [00-3727 00-3728]
1/26/01	RECORDS received: Appendix filed by Appellants Cedar Rapids in 00-3727, Appellants Davenport Cellular in 00-3727, Appellant WWC License in 00-3728 consisting of 1 Volume(s), 3 Copies. [00-3727, 00-3728] (lmt) [00-3727 00-3728]

1/26/01	BRIEF FILED - Brief of Appellant- Cedar Rapids Cellular in 00-3727, Davenport Cellular in 00-3727 52 pages w/addendum 10 copies - w/service 1/25/01 w/diskette . Defects: Signature, COC [00-3727] [1354133] (lmt) [00-3727]

Docket as of July 29, 2002 8:50 pm Page 5

00-3727 Cedar Rapids, et al v. Thomas Miller

2/28/01	RESPONSE of aplnt, Cedar Rapids in 00-3727, Davenport Cellular in 00-3727, WWC License in 00-3728 , in opposition to appellee motion extension of time to file brief filed by Thomas Miller [1367023-1] [1367024] in 00-3727, in 00-3728 [1367023-1] [1367024] in 00-3728 . (lmt) [00-3727 00-3728]
3/2/01	MOTION of aplee, Thomas Miller in 00-3727, Thomas Miller in 00-3728 , for extension of time to file brief until 3/28/01 00-3727, 00-3728] [1367023] w/service 2/27/01 (lmt) [00-3727 00-3728]
3/5/01	ORDER filed:granting in part appellee motion extension of time to file brief [1367040] in 00-3727, 00-3728 Aplee brief now due on 3/19/01 in 00-3727, in 00-3728 (lmt) [00-3727 00-3728]
3/22/01	RECORDS received: Appendix filed by Appellee Thomas Miller in 00-3727, Appellee Thomas Miller in 00-3728 consisting of 1 Volume(s), 3 Copies. [00-3727, 00-3728] (lmt) [00-3727 00-3728]
3/22/01	BRIEF FILED - Brief of Appellee - Thomas Miller in 00-3727 . - 10 copies - w/service 3/19/01 . w/diskette Defects: COC [00-3727] [1376333] (lmt) [00-3727]
4/2/01	RECORDS received: Transcript, consisting of 1 Volume of oral arguments on motion to dismiss held on 8/7/2000 in the USDC / SDCR. Location STL. [00-3727, 00-3728] (stl) [00-3727 00-3728]
4/3/01	TO SCREENING to rw. [00-3727, 00-3728] (kms) [00-3727 00-3728]
4/3/01	Brief Correction(s) received from Appellee Thomas Miller in 00-3727, Appellee Thomas Miller in 00-3728 . Correction(s): COC. [00-3727, 00-3728] (lmt) [00-3727 00-3728]
4/5/01	BRIEF FILED - Reply brief - Cedar Rapids in 00-3727, Davenport Cellular in 00-3727 . 5798 words 10 copies - w/service 4/2/01 . w/diskette [00-3727] [1379825] (lmt) [00-3727]
4/6/01	RETURNED from Screening (30) [00-3727, 00-3728] (bwb)

[00-3727 00-3728]

5/30/01	28(j) citation received and filed from Appellants Cedar Rapids in 00-3727, Appellants Davenport Cellular in 00-3727 FOR CAL.[00-3727] [1398626] (lmt) [00-3727]
10/16/01	*SET FOR ARGUMENT* - November 2001 in St. Paul, MN. (bwb) [00-1923 00-1982 00-3726 00-3727 00-3728 01-1005 01-1052 01-1103 01-1106 01-1174 01-1178 01-1233 01-1237 01-1288

01-1322 01-1440 01-1447 01-1455 01-1487 01-1493 01-1516 01-1584 01-1585 01-1616 01-1705 01-1728 01-1735 01-1737 01-1747 01-1752 01-1764 01-1790 01-1844 01-1859 01-1867 01-1869 01-1870 01-1873 01-1875 01-1914 01-1947 01-1948 01-1976 01-2012 01-2032 01-2058 01-2059 01-2062 01-2097 01-2109 01-2166 01-2173 01-2199 01-2200 01-2286 01-2301 01-2361 01-2394 01-2696 01-2796]

10/24/01	RECORDS received: from St. Louis. Records Included: 1 Vol. Oral Arg. on Motion to Dismiss TR[00-3727] (jab) [00-3727 00-3728]
11/14/01	APPEARANCE for appellant, attorney Bret Alan Dublinske [00-3727] [1455712] (jmh) [00-3727]
11/14/01	ARGUED AND SUBMITTED IN ST. PAUL TO JUDGES Kermit E. Bye, Circuit Judge, Richard S. Arnold, Circuit Judge, William J. Riley, Circuit Judge . Carter G. Phillips & Bret Alan Dublinske for Appellants Julie F. Pottorff for Appellee Thomas Miller in 00-3727 . Rebuttal by: Phillips & Dublinske . RECORDED. [00-3727, 00-3728] (jmh) [00-3727 00-3728]
2/14/02	THE COURT: Kermit E. Bye, Richard S. Arnold, William J. Riley. OPINION FILED by William J. Riley, Authoring Judge PUBLISHED . [00-3727, 00-3728] [1486208] (mer) [00-3727 00-3728]
2/14/02	JUDGMENT: Kermit E. Bye, Richard S. Arnold, William J. Riley. :The judgment of the district court is VACATED and the case REMANDED to the District Court in accordance with the opinion. [00-3727, 00-3728] [1486212] (mer) [00-3727 00-3728]
3/7/02	MANDATE ISSUED [00-3727, 00-3728] (mer) [00-3727 00-3728]
3/11/02	Requesting St. Paul return records to appropriate district court/agency/attorney as case is now closed. 1 volume of transcript [00-3727, 00-3728] (jjf) [00-3727 00-3728]
3/14/02	RECEIPT for Mandate. [00-3727, 00-3728] [1496362] (cck)

[00-3727 00-3728]

3/19/02	Record Sent out of the office to lower court at the end of appellate proceedings. Records Included: 1 Vol. Transcript (Oral Argument on Motion to Discuss). [00-3727, 00-3728] (jab) [00-3727 00-3728]

[END OF DOCKET: 00-3727]

PACER Service Center			
Transaction Receipt			
08/25/2005 05:51:30			
PACER Login:	db0015	**Client Code:**	
Description:	dkt report	**Case Number:**	00-3727
Billable Pages:	6	**Cost:**	0.48

CLOSED

U.S. District Court
Northern District of Iowa (Cedar Rapids)
CIVIL DOCKET FOR CASE #: 1:00-cv-00058-MJM

CR Cellular Telephon, et al v. Miller
Assigned to: Judge Michael J Melloy
Demand: $0
Cause: 28:2201 Constitutionality of State Statute(s)

Date Filed: 04/11/2000
Nature of Suit: 950 Constitutional - State Statute
Jurisdiction: Federal Question

Date Filed	#	Docket Text
04/11/2000	1	COMPLAINT (Summons(es) w/notice,consents,report form, LR16/41 to atty/USM for svc) (w/AO #1451 to filing attorney) SCHEDULING REPORT DDL 8/29/00 DGE (Entered: 04/11/2000)
04/11/2000	2	RECEIPT #110575 in the amount of $150.00 DGE (Entered: 04/11/2000)
06/12/2000	3	MOTION by Defendant to Dismiss (Resist. ddl: 07/18/00) (Rply. ddl: 7/28/00) , and REQUEST for Oral Argument assigned to Judge Michael J. Melloy DSR Modified on 07/05/2000 (Entered: 06/12/2000)
06/12/2000	4	BRIEF by Defendant in Support of Motion to Dismiss [3-1], of Request for Oral Argument [3-2] DSR Modified on 06/12/2000 (Entered: 06/12/2000)
06/22/2000	5	ORDER by Judge Michael J. Melloy Plfs' resistance, if any, to the motion to dismiss shall be filed within fifteen days from the date of this order; the Dfts shall have ten days to file a reply brief, which shall not exceed fifteen pages; Setting Oral Arguments on the Motion to Dismiss [3-1] for 3:00 p.m. on 8/7/2000, w/Judge Michael J. Melloy, 3rd Floor Courtroom, U.S. Dist. Crthse., Cedar Rapids (cc: all counsel) DSR (Entered: 06/22/2000)
06/23/2000	6	MOTION by Plaintiffs for Extension of Time to Resist Dft's Motion to Dismiss assigned to Chief Mag Judge John A. Jarvey DSR (Entered: 06/23/2000)
06/28/2000	7	ORDER by Judge Michael J. Melloy Granting Motion for Extension of Time to Resist Dft's Motion to Dismiss [6-1]; the plaintiffs shall have to and including July 10, 2000, to file a resistance to the dft's motion to dismiss; the defendant shall then have ten days within which to file a reply brief which shall not exceed fifteen pages; the oral arguments on the motion will remain scheduled for August 7, 2000, at 3:00 p.m. (cc: all counsel) DSR (Entered: 06/28/2000)
07/03/2000	8	Plaintiffs' MOTION to Amend Briefing Schedule assigned to Judge Michael J. Melloy DSR (Entered: 07/03/2000)
07/05/2000	9	ORDER by Chief Mag Judge John A. Jarvey Granting Motion to Amend

		Briefing Schedule [8-1]; Plfs shall have to and including July 18, 2000, within which to file a resistance of not more than 30 pages to the Dft's Motion to Dismiss; the Defendant shall have to and including July 28, 2000, within which to file a reply of not more than 15 pages (cc: all counsel) DSR (Entered: 07/05/2000)
07/05/2000	10	ORDER by Judge Michael J. Melloy: Plaintiffs shall file resistance to defendant's motion by 7/18/00; plaintiffs brief shall not exceed 30 pages; defendant shall have 10 days thereafter to file a reply brief of no more than 15 pages; the hearing shall remain scheduled for 8/7/2000 at 3:00 pm (cc: all counsel) MJJ Modified on 07/05/2000 (Entered: 07/05/2000)
07/18/2000	11	Plaintiffs' RESISTANCE to Defendants Motion to Dismiss [3-1]DSR Modified on 07/18/2000 (Entered: 07/18/2000)
07/26/2000	12	TABLE OF AUTHORITIES by Plaintiff (Re Plf's Resistance to Motion to Dismiss) [11-1], [3-1], [3-2] DSR (Entered: 07/26/2000)
07/31/2000	13	REPLY BRIEF by Defendant in Support of Motion to Dismiss [3-1] DSR (Entered: 07/31/2000)
08/07/2000	14	CLERK'S COURT MINUTES: from Oral Arguments on Motion to Dismiss held on August 7, 2000 before Judge Michael J. Melloy, Ruling Reserved on [3-1] Motion to Dismiss; motion hearing ddl satisfied; Court Reporter Tracy Lamp DSR (Entered: 08/07/2000)
08/09/2000	15	Plaintiffs' REQUEST for Leave to File Brief Regarding The Impact of Ruling (RE: Motion to Dismiss) assigned to Judge Michael J. Melloy DSR (Entered: 08/09/2000)
08/14/2000	16	RESISTANCE by defendant to motion for Leave to File Brief Regarding The Impact of Ruling (RE: Motion to Dismiss) [15-1] MAP (Entered: 08/14/2000)
08/14/2000	17	ORDER by Judge Michael J. Melloy granting motion for Leave to File Brief Regarding The Impact of Ruling (RE: Motion to Dismiss) [15-1]; each party will be given 10 days to file brief to address impact of Judge Pratts' ruling in the southern district of Iowa case (cc: all counsel) DGE (Entered: 08/14/2000)
08/24/2000	18	Wireless Service Providers' SUPPLEMENTAL BRIEF Regarding Southern District Ruling (Re: Motion to Dismiss) [3-1] DSR (Entered: 08/24/2000)
08/25/2000	19	Defendant's SUPPLEMENTAL BRIEF to the Court (Re: Motion to Dismiss) [3-1] DSR (Entered: 08/25/2000)
09/15/2000	20	ORDER by Judge Michael J. Melloy Granting Defendant, Attorney Thomas J. Miller's Motion to Dismiss as to all claims in this action [3-1] (cc: all counsel) DSR (Entered: 09/15/2000)
09/15/2000	21	JUDGMENT: Plaintiffs take nothing, that the action is dismissed as to all claims on the merits, and that Defendant shall recover of the Plaintiffs his costs of action terminating case ; JUDGMENT BOOK 19, ENTRY 50

		(cc: all counsel) DSR Modified on 09/15/2000 (Entered: 09/15/2000)
09/29/2000	22	MEMORANDUM IN SUPPORT OF MOTION by plaintiff WWC License LLC to reconsider assigned to Judge Michael J. Melloy MJJ (Entered: 10/02/2000)
10/10/2000	23	RESISTANCE by defendant Thomas Miller to motion to reconsider [22-1] DGE (Entered: 10/10/2000)
10/10/2000	24	BRIEF FILED by defendant Thomas Miller re motion response [23-1] DGE (Entered: 10/10/2000)
10/11/2000	25	ORDER by Judge Michael J. Melloy denying WWC's motion to reconsider [22-1] (cc: all counsel) MJJ (Entered: 10/11/2000)
11/09/2000	26	NOTICE OF APPEAL by plaintiffs CR Cellular Telephone and Davenport Cellular from Dist. Court decision order [25-1], judgment [21-2], order [20-1] (cc: all counsel w/dkt sheet 8th CCA w/dkt sheets, Orders Judgment) MJJ (Entered: 11/09/2000)
11/09/2000	27	RECEIPT # 112431 in the amount of $ 105.00 appeal feel paid by plaintiffs CR Cellular, Davenport Cellular MJJ (Entered: 11/09/2000)
11/09/2000	28	NOTICE OF APPEAL by plaintiff WWC License LLC from Dist. Court decision order [25-1], judgment [21-2], order [20-1] (cc: all counsel w/dkt sheet 8th CCA w/dkt sheets, Orders Judgment) MJJ (Entered: 11/09/2000)
11/09/2000	29	RECEIPT # 112432 in the amount of $ 105.00 appeal fee for plaintiff WWC License LLC MJJ (Entered: 11/09/2000)
11/09/2000	30	STATEMENT OF CORPORATE DISCLOSURE required by Eighth Circuit filed by plaintiff WWC License LLC (cc: all counsel and Eighth Circuit) MJJ (Entered: 11/09/2000)
11/16/2000		REMARK: APPEAL NUMBER 00-3727 (CR Cellular v. Miller) and APPEAL NUMBER 00-3728NICR (WWC License v. Miller) DSR (Entered: 11/16/2000)
03/19/2001		REMARK: Transcript of 8/7/00 proceedings sent 3/19/01 to Eighth Circuit GGC (Entered: 03/19/2001)
03/11/2002	31	MANDATE from USCA vacating judgment of dismissal and remanding the matter back to District Court [Appeal [28-1], remanding the matter back to District Court [Appeal [26-1] GGC (Entered: 03/11/2002)
03/11/2002	32	CERTIFIED COPY OF JUDGMENT from USCA GGC (Entered: 03/11/2002)
03/27/2002		Oral Arguments on Motion to Dismiss Transcript (1 Vol.) RETURNED from U.S. Court of Appeals DLP Modified on 03/28/2002 (Entered: 03/28/2002)
05/10/2002	33	MOTION by plaintiff CR Cellular Telephone, plaintiff Davenport Cellular to dismiss with prejudice assigned to Judge unassigned GGC

		(Entered: 05/10/2002)
05/29/2002	33	ORDER by Chief Mag Judge John A. Jarvey granting motion to dismiss with prejudice all claims in this matter against Thomas J. Miller [33-1] (cc: all counsel) GGC (Entered: 05/29/2002)